



JUTA'S ADVANCE NOTIFICATION SERVICE

NOVEMBER 2015

Dear *South African Law Reports* and *Criminal Law Reports* subscriber

Herewith the cases in the November law reports.

JUDGMENTS OF INTEREST IN THE NOVEMBER EDITIONS OF THE *SALR*, *SACR* AND *LRNA LAW REPORTS*.

- [Click on the case name to download the original judgment.](#)

SOUTH AFRICAN LAW REPORTS

Loss of support

A child's duty to support a needy parent, as recognised under African customary law, must be extended to cultures—like Muslim and Hindu—which share African culture's societal norms regarding parents and the elderly, and impose a similar duty on children to support their parents. *Osman v Road Accident Fund* 2015 (6) SA 74 (GP)

The thin-skull rule

In a claim against the Road Accident Fund, the claimant's psychological fragility made her less resistant to chronic pain, which forced into early retirement. The Fund was found to be liable for the resultant loss of earnings. *Prinsloo v Road Accident Fund* 2015 (6) SA 91 (WCC)

Res ipsa loquitur and medical negligence

A mother and child claimed damages resulting from their treatment at a state hospital. While *res ipsa loquitur* seldom applied in medical negligence cases, the evidence established a strong *prima facie* case of grave negligence, while the defence was one of bare denial, justifying the application of the principle. Attorney-and-client costs would be awarded against the defendant as a mark of the court's disapproval of his uncompassionate and obstructive conduct. *Nzimande v MEC for Health, Gauteng* 2015 (6) SA 192 (GP)

SOUTH AFRICAN CRIMINAL LAW REPORTS

Psychological defence failing

On two counts of murder, the accused raised the defence of temporary pathological incapacity. But his calm actions before and after the murders showed self-control and planning. He was found guilty of both counts of murder. *S v Seroba* 2015 (2) SACR 429 (GJ)

Customary practice as defence to rape

An aberrant form of the customary practice of ukuthwala that allowed the abduction and rape of a bride, was not protected under our law. Belief in such an aberration could not justify rape. *S v Jezile* 2015 (2) SACR 452 (WCC)

Diversion for juvenile offenders

A 16-year-old was charged with culpable homicide for driving a motor vehicle without a licence and causing a collision that killed an occupant of another vehicle. For a diversion from the criminal justice system, the preliminary enquiry had to consider (1) the child acknowledging responsibility; and (2) the prosecutor indicating that the matter may be diverted in terms of Child Justice Act 75 of 2008. *S v LR* 2015 (2) SACR 497 (GP)

THE NAMIBIAN LAW REPORTS

Costs award for lay litigant

A lay person was awarded a costs order, limited to disbursements reasonably incurred. He was aggrieved by this and argued that it violated his dignity and discriminated against him because he was not an admitted legal practitioner, and that he was entitled to just and favourable remuneration. *Kamwi v Standard Bank Namibia Ltd and Others* 2015 (3) NR 678 (HC)

Court's jurisdiction in church affairs

An order was sought declaring that the second applicant be leader of the church and that respondents be expelled, but this relief was exclusively ecumenical or ecclesiastical in nature, and the court had no jurisdiction to adjudicate on such matters. *New African Methodist Episcopal Church in the Republic of Namibia And Another v Kooper and Others* 2015 (3) NR 705 (HC)

Counsel from across the border

An accused person was entitled to legal representation of his or her choice, as enshrined in art 12(e) of the Namibian Constitution. The accused was granted a postponement so that his counsel could acquire the necessary immigration papers required to work in Namibia. *S v Conradie and Another* 2015 (3) NR 863 (HC)

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Kind Regards

The Juta Law Reports Team

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SHIVUTE CJ, CHOMBA AJA and O'REGAN AJA

2014 OCTOBER 17; 2015 APRIL 3

Contract—Interpretation—Proper approach to interpretation of contracts—Context in which document drafted always relevant to construction—Unitary exercise—Taking into account text and context as well as knowledge of contracting parties at conclusion of contract—Construction of contract matter of law and not of fact—Interpretation of contracts matter for court and not witnesses.

Contract—Mistake—Unilateral mistake—Agreement made order of court—Order may be set aside if original agreement vitiated by mistake—Appellant could not rely on unilateral

mistake—Meaning appellant sought to attach to agreement inconsistent with language of agreement.

Practice—Judgments and orders—Rescission—Irregular proceedings adopted to obtain order—Order sought and granted in error in absence of party affected thereby—Not necessary to show good cause for rescission of judgment in terms of High Court Rule 103(1)(a).

TELECOM NAMIBIA LTD v COMMUNICATIONS REGULATORY AUTHORITY OF NAMIBIA AND OTHERS (HC)

PARKER AJ

2015 FEBRUARY 19; MARCH 19

[2015] NAHCMD 66

Practice—Discovery and inspection—Application to compel discovery—In terms of High Court Rule 70(3)—Rule 70(3) making rule 28 applicable to discovery in motion proceedings—Rule only applicable in exceptional circumstances—Documents must in addition be relevant and proportionate to needs of case.

STANDARD BANK NAMIBIA LTD AND OTHERS v MALETZKY AND OTHERS (SC)

SHIVUTE CJ, MAINGA JA and O'REGAN AJA

2015 MARCH 15; JUNE 24

Practice—Service—Purpose of—Notice of nature and contents of process—Irregular service—Effect depending on nature of proceedings and extent of irregularity—Defective service could be nullity or condonable in absence of prejudice.

Practice—Parties—Joinder—Misjoinder of parties—Case of each party to proceedings turning on own facts—Not substantially same questions of law or fact—Improper joinder—High Court Rules 10(1) and 10(3).

Practice—Parties—Joinder—Non-joinder of necessary parties—Prejudice—Notice of motion and founding affidavits set aside—Entirely irregular.

Practice—Applications and motions—Affidavits—Purpose of founding affidavits to identify key facts to enable respondent to know case to be met—Material defects in founding affidavits of lay litigants—Court to act fairly to all litigants—Non-compliance with rule 6(1) of High Court Rules in material respects—Notice of motion and founding affidavits set aside.

Costs—Constitutional litigation—Proper approach—Departure from ordinary costs rule when litigants conduct litigation in reasonably proper manner—Litigants pursued relief in materially flawed manner against wide range of respondents—Ordered to pay costs.

S v UNENGU (HC)

LIEBENBERG J

2015 JANUARY 22–23, 26–30; FEBRUARY 12, 24

[2015] NAHCMD 33

Criminal procedure—Evidence—Witness—Single witness—Rape and assault—Evidence of single witness need not be perfect in every respect—Court must be satisfied that truth was told.

Criminal procedure—Evidence—Witness—Credibility—Self-contradictions—Discrepancy between witness statement and witness evidence—Affecting credibility only when discrepancy material—Not be evaluated in isolation—Regard must also be had to rest of witness's evidence, considered against totality of evidence presented.

Criminal procedure—Evidence—Assessment of—Failure to call witness—Failure by state did not per se justify any adverse inference against the state case—Justification to do so would depend on circumstances of case—Remained open to defence to call witness once state decided not to do so.

S v MOUSSA (HC)

PARKER AJ

2014 DECEMBER 12; 2015 FEBRUARY 11

[2015] NAHCMD 21

Criminal procedure—Bail—Appeal against magistrate’s refusal to grant bail—Factors taken into account on appeal—Long period of detention between bail applications constituting ‘new fact’ after previous bail application—Bail granted subject to conditions.

Constitutional law—Fundamental rights—Fair trial—Trial to take place within reasonable time—Seven years since accused arrested and charged—Unconscionably long delay—Violating appellants’ rights guaranteed by art 12(1) of Constitution.

FERNANDES v MINISTER OF HOME AFFAIRS AND IMMIGRATION AND ANOTHER (HC)

VAN NIEKERK J

2011 OCTOBER 20; 2015 MARCH 16

[2015] NAHCMD 59

Administrative law—Administrative action—Review of—Administrative body bound by reasons for decision given to applicant for refusal of permit.

Administrative law—Administrative action—Review of—Administrative body relying on notorious facts—Facts must be generally well known to reasonably informed person including to court and applicant—Where such knowledge not known applicant must be apprised of such knowledge—Applicant must be given opportunity to controvert evidence.

Administrative law—Administrative bodies—Fair administrative justice in terms of art 18 of Namibian Constitution—Applicant applying for and granted five consecutive temporary work permits—Sixth application refused—Audi alteram partem rule should be observed when decisionmaker privy to relevant information of which applicant ignorant and when circumstances were such as creating a reasonable expectation of succeeding.

FUTENI COLLECTION (PTY) LTD v DE DUINE (PTY) LTD (HC)

MASUKU AJ

2015 FEBRUARY 4; MAY 27

[2015] NAHCMD 119

Practice—Judgments and orders—Default judgment—Order declaring property executable—Nulla bona return and application to court required to declare mortgaged property executable prior to issue of writ—New application required—Personal service of form 24 notice of application to have property declared executable—Onus on judgment debtor or third party residing in property to apprise court of status of property—Whether property primary home or leased as a home—Judgment debtor to advance reasons why property should not be declared executable—Reasons could be provided in writing or with leave of court through oral submissions—High Court Rules, rule 108(1)–(2).

Contract—Rectification—Essential allegations in claim for rectification—A written agreement; written document incorrectly reflecting parties’ intention; both parties intended to conclude written agreement; mistake in drafting; actual wording of agreement as rectified—Action not defended—Substantial compliance where actual wording as rectified appearing in prayers only.

NATIONAL COLD STORAGE, A DIVISION OF MATADOR ENTERPRISE (PTY) LTD v NAMIBIA POULTRY INDUSTRIES (PTY) LTD (HC)

UEITELE J

2014 NOVEMBER 12; 2015 MARCH 3

[2014] NAHCMD 40

Contract—Formation—Consensus—Firm unequivocal offer made—Silence and repeated conduct consistent with offer—Tacit agreement through acquiescence.

Contract—Specific performance—Discretion of court—Alternative remedy damages—Court should avoid becoming supine and spineless in dealing with offending contract breaker, by giving him benefit of paying damages—No grounds advanced by respondent against exercise of discretion in favour of applicant.

NAMIBIA CUSTOM SMELTERS (PTY) LTD v MUPETAMI AND ANOTHER (LC)

PARKER AJ

2015 MARCH 13; APRIL 16

[2015] NALCMD 7

Labour law—Dismissal—Fairness of—Dismissal within discretion of employer—Discretion not absolute—Dismissal must be fair punishment in circumstances—Employee guilty of dishonesty and breach of rules—Serious misconduct—Continuation of employment insupportable—Valid and fair reason for dismissal—Labour Court Act 11 of 2007, s 33(1)(a).

S v CONRADIE AND ANOTHER (HC)

MASUKU AJ

2015 APRIL 16, 27

[2015] NAHCMD 101

Criminal procedure—Trial—Postponement—Application on ground that South African counsel awaiting visa—Court recognising accused entitlement to legal representative of choice in terms of art 12(e) of Namibian Constitution.

Criminal procedure—Trial—Postponement—Applicant for postponement seeking indulgence—Court to be satisfied postponement in interest of justice—Principles applicable to postponements in civil proceedings also applicable to criminal cases.

METHEALTH NAMIBIA ADMINISTRATORS (PTY) LTD v MATUZEE AND OTHERS (LC)

UEITELE J

2015 MARCH 6, 18; APRIL 10

[2015] NALCMD 5

Arbitration—Award—Appeal against—Right restricted to questions of law—Court required to determine as question of law whether evidence such that no reasonable arbitrator could make such finding or whether evidence could not reasonably support finding—Labour Act 11 of 2007, s 89(1)(a).

Labour law—Labour dispute—Unfair labour practice—Referral of dispute to Labour Commissioner—Failure to sign referral form LC 21 or attach statement—Employer participating in conciliation and arbitration proceedings—Not rendering proceedings a nullity—Rules Relating to Conduct of Conciliation and Arbitration before Labour Commissioner, rule 5.

PROSECUTOR-GENERAL v UUYUNI (SC)

MAINGA JA, CHOMBA AJA and HOFF AJA

2014 OCTOBER 21; 2015 JULY 2

Criminal procedure—Search and seizure—Preservation of property order—Application in terms of s 51 of Prevention of Organised Crime Act 29 of 2004—Application brought ex parte and in camera—Provisions of s 98 not applicable to ex parte applications—First stage of procedure of s 51 ex parte and in camera—Not in violation of art 12(1) of Constitution or s 13 of High Court Act 16 of 1990—Second stage in terms of s 52(3)—Opportunity to oppose forfeiture of preserved property.